

**Senator Chuck Grassley
Questions for the Record**

**Todd M. Hughes
Nominee, U.S. Circuit Judge for the Federal Circuit**

- 1. Whistleblowers play an important role in the Federal Government and in business and industry. They risk a great deal to come forward and uncover wrongdoing, waste, fraud and abuse. Oftentimes, whistleblowers face significant retaliation or retribution, both overtly and covertly, from their employers.**

- a. Do you support federal whistleblower laws? Please explain any actions you have taken to support or strengthen such laws.**

Response: I am firmly committed to federal whistleblower laws. In my role as a government attorney, I have counseled Department of Justice lawyers and officials from other Executive Branch agencies regarding the proper interpretation of the Whistleblower Protection Act (WPA) and advised officials about how to be fully compliant with the law.

- b. You have spent much of your career defending governmental interests in whistleblower suits.**

- i. Have you ever represented a government whistleblower or advocated for a whistleblower's interest?**

Response: As a government attorney, my primary responsibility has been to represent agencies in appeals to the Federal Circuit; therefore, I have not individually represented any government whistleblower. However, in *Costello v. Merit Systems Protection Board*, 182 F.3d 1372 (Fed. Cir. 1999), I represented the Office of Special Counsel (OSC), the federal agency charged with protecting the interests of whistleblowers. In that case, OSC, which was an intervenor in the appeal, supported the Merit Systems Protection Board's (MSPB's) decision imposing discipline on a federal manager for retaliating against a whistleblower. In another instance, I determined that the MSPB had potentially applied the wrong legal standard in rejecting a whistleblower's claim and recommended, over the employing agency's objections, a remand to the MSPB for further action. *Ganski v. Department of Interior*, 232 F.3d 910 (Fed. Cir. 2000).

- ii. Please describe any actions you have taken, including legal representation, opposing federal government whistleblowers who claimed they were subject to prohibited personnel practices after making protected disclosures.**

Response: For 19 years, I have worked for the Commercial Litigation Branch of the Civil Division within the Department of Justice. The Commercial Litigation Branch litigates exclusively on behalf of the United States and its agencies in a wide variety of cases. With respect to the Federal Circuit and whistleblowers, my primary responsibility during my years at the Department has involved representing government agencies that have already prevailed below – in front of the MSPB – in sustaining adverse actions imposed by the agencies. These cases include me personally handling appeals as well as supervising cases handled by other trial attorneys in my office. Over the course of my representation in these cases, I have had the obligation to make reasonable, good faith arguments on behalf of my client agencies. However, I also have a responsibility to raise concerns if I believe an agency's actions are indefensible or its legal position is without merit. As I mentioned in response to question 1a, my general expertise in the WPA means that I regularly provide advice and feedback to officials in order to help managers understand their obligations under the WPA.

One example of a case I handled is *Strader v. Department of Agriculture*, 475 Fed. Appx. 316, 2012 WL 1388337 (Fed. Cir. 2012). In that case, I served as the supervisory attorney for an appeal in which the Federal Circuit affirmed the decision of the MSPB, sustaining Mr. Strader's removal. The court concluded that the MSPB administrative judge had properly determined that Mr. Strader's removal was a result of the expiration of his term appointment, and not due to any protected disclosures.

iii. What evidence can you provide that demonstrates you will handle whistleblower issues in an impartial fashion?

Response: I understand and take very seriously the differences between serving as an impartial judge and an advocate representing a client. If I am fortunate enough to be confirmed, I would be committed to acting as an impartial judge in all cases that might come before me – including whistleblower cases. Although as an advocate, I was obligated to represent my client and make reasonable arguments on an agency's behalf, I also have had the responsibility as a Department of Justice attorney to make my own judgment about whether an agency's position was correct and advocate for a different position if I disagreed.

That was the situation in the *Ganski* case discussed above, where I disagreed with the grounds on which an agency had prevailed against a whistleblower and recommended that the case be sent back to the MSPB for a new determination, a recommendation which was internally adopted in the Department of Justice, and was subsequently ordered by the court. I have taken similar actions in other appeals handled by my office in other

types of cases, such as veterans benefits and MSPB cases, where I have disagreed with the agencies' positions and recommended either settlement of the appeal or a remand for further action. That independent exercise of my judgment and my willingness to challenge agency positions is evidence of my ability to deal with whistleblowers and indeed all litigants in a fair and impartial manner.

c. Do you believe that any worker employed by any agency dealing in national security matters, without regard to the existence of the worker's access to confidential information or security clearance, should be precluded from:

i. Bringing whistleblower complaints before Congress? Please explain why or why not.

Response: Consistent with the terms of the Whistleblower Protection Act, federal employees working in any agency can bring whistleblower complaints before appropriate Members of Congress.

ii. Appealing adverse actions taken against them? Please explain why or why not.

Response: My understanding is that all federal workers, regardless of their employment status at a national security agency, have some type of ability to challenge adverse employment decisions. In the Whistleblower Protection Act, Congress has excluded employees of certain national security agencies from appealing adverse actions to the MSPB and the Federal Circuit. 5 U.S.C. 2302(a)(2)(C). Even employees at those agencies, however, have some type of internal administrative review.

d. May an employee be exempted from having a right to appeal an adverse action if that employee's position is designated as national security sensitive (or any other applicable status subject to exemption under CSRA or otherwise) when that designation was made before the adverse action was taken?

Response: Employees in national security sensitive positions have the right to appeal any adverse action covered by the Civil Service Reform Act (CSRA), regardless of the timing of that designation. In *Berry v. Conyers*, No. 2011-3207, the Federal Circuit en banc is considering a related, but more narrow question: whether the determination of an individual's eligibility to occupy a position designed as national security sensitive is the type of adverse action covered by the CSRA. If confirmed, I would follow the Federal Circuit's decision in that appeal and all other applicable precedent.

e. May an employee be exempted from having a right to appeal an adverse action if that employee's position is designated as national security sensitive

(or any other applicable status subject to exemption under CSRA or otherwise) when that designation was made after the adverse action was taken?

Response: Employees in national security sensitive positions have the right to appeal any adverse action covered by the Civil Service Reform Act (CSRA), regardless of the timing of that designation. In *Berry v. Conyers*, No. 2011-3207, the Federal Circuit en banc is considering a related, but more narrow question: whether the determination of an individual's eligibility to occupy a position designed as national security sensitive is the type of adverse action covered by the CSRA. If confirmed, I would follow the Federal Circuit's decision in that appeal and all other applicable precedent.

f. What role do national security interests play in exempting an adverse action from appeal?

Response: With the exception of certain national security agencies excepted by Congress, *see* 5 U.S.C. 2302(a)(2)(C)(ii), national security interests should not play any role in exempting an adverse action, as defined by the CSRA, from appeal. Individuals in national security positions, including those that possess security clearances, maintain the right to appeal adverse employment actions in the same manner as do employees in positions that do not involve national security or require a security clearance. The Supreme Court, in *Egan v. Department of the Navy*, 484 U.S. 518 (1988), concluded that a security clearance determination did not constitute an adverse action otherwise subject to review.

g. Are employees in non-intelligence positions exempted from a right to appeal adverse actions? Why or why not?

Response: Employees in non-intelligence positions have the right to appeal adverse actions as defined by the CSRA.

h. Do low-level employees working for the Department of Defense with no access to classified information and having no security clearance have a right to appeal the merits of an adverse action taken against their employment status?

Response: Employees in national security sensitive positions have the right to appeal any adverse action covered by the Civil Service Reform Act (CSRA), regardless of the timing of that designation. In *Berry v. Conyers*, No. 2011-3207, the Federal Circuit en banc is considering a related, but more narrow question: whether the determination of an individual's eligibility to occupy a position designed as national security sensitive is the type of adverse action covered by the CSRA. If confirmed, I would follow the Federal Circuit's decision in that appeal and all other applicable precedent.

- i. **What are the differences between a federal employee with no access to classified information and no security clearance who works for an agency dealing in national security matters and a federal employee with no access to classified information and no security clearance who works for an agency completely divorced from national security?**

Response: There are no differences between the two groups identified by the question.

- j. **Considering any stated differences, should these two employees be subject to different rights to appeal adverse actions taken against their employment status? Why or why not?**

Response: Employees in national security sensitive positions have the right to appeal any adverse action covered by the Civil Service Reform Act (CSRA), regardless of the timing of that designation. In *Berry v. Conyers*, No. 2011-3207, the Federal Circuit en banc is considering a related, but more narrow question: whether the determination of an individual's eligibility to occupy a position designed as national security sensitive is the type of adverse action covered by the CSRA. If confirmed, I would follow the Federal Circuit's decision in that appeal and all other applicable precedent.

2. **Your broad reading of *Navy v. Egan* in *Hesse v. Department of State*, and your support of the Office of Personnel Management in *Berry v. Conyers* is of particular concern to me.**

- a. **Does *Egan* preclude any and all review of whistleblower retaliation claims in any security-related context? Please explain your views on the breadth and limitations of this case.**

Response: As noted above, my primary responsibility during my years at the Department has involved representing government agencies that have already prevailed below – in front of the MSPB – in sustaining adverse actions imposed by the agencies. Thus, the positions advanced in *Hesse* and *Conyers* were done so on behalf of my client agencies.

Egan answered the narrow question of whether a security clearance determination is an "adverse action" reviewable by the MSPB or in the federal courts, and concluded that it was not. Employees who work in the national security area or who possess security clearances may still pursue whistleblower claims as long as the claims do not require the MSPB or the Federal Circuit to address the merits of the security clearance determination. Moreover, employees have other alternative means of challenging negative security clearance determinations, including administrative review within the agency and actions before an agency inspector general.

- b. Are there other contexts in which you feel *Egan* entirely precludes review of these claims?**

Response: *Egan* does not entirely preclude review of all claims. To the extent that claims in other areas of the law might require addressing the merits of a security clearance determination, courts have recognized that *Egan* precludes judicial review. See, e.g., *El-Ganayni v. Department of Energy*, 591 F.3d 176 (3rd Cir. 2010). However, employees have other alternative means of challenging negative security clearance determinations, including administrative review within the agency and actions before an agency inspector general.

- 3. *National Organization of Veterans Advocates v. Secretary of Veteran Affairs* is a recent case before the Federal Circuit that your division at the DOJ has been handling. Earlier this year, the Federal Circuit threatened sanctions against the government for repeatedly making representations to the court when in fact the represented agency, in this case the Department of Veterans Affairs, continued to act contrary to those representations.**

- a. Please describe in detail your involvement in this case?**

Response: I am the supervisory attorney in this appeal. In that role, I am responsible for reviewing all written materials, and conferring with the trial attorney about the case. At some point after the appeal was filed, internal discussions occurred at the Department of Justice, the result of which was to advise the Department of Veterans Affairs (VA) that the regulation at issue was procedurally deficient and that the Justice Department would not defend the case. VA agreed with that recommendation, agreed to revoke the regulation, and also committed to not apply the regulation in the interim. As discussed further below, when I was notified that VA failed to meet this commitment, I took immediate action to address the situation.

- b. When did you first become aware of the VA's failure to comply with the representations made to the court on its behalf?**

Response: I became aware of VA's failure when counsel for the National Organization of Veterans Advocates (NOVA) personally informed me of the situation. I immediately contacted my counterparts in VA General Counsel's office and obtained their assurances that they would comply with the representations made to the Court.

- c. Please explain why there was such a disparity between the promises made by your division's attorneys and the conduct of the VA.**

Response: The representations made to the court by my Division were based on the assurances of the VA that it would discontinue application of the rule. Those assurances were given by senior counsel at the VA and, based on the long

working relationship between my office and those officials, I had no reason to suspect that the commitment would not be honored. Moreover, senior VA leadership instructed the Board of Veterans Appeals to discontinue application of the challenged rule. Some administrative judges, however, continued applying the rule and that fact led the court to consider sanctions against the VA.

In its sanctions order, the court did not suggest that the Department of Justice lawyers handling the court case had acted inappropriately in any way. In fact, the court credited the Department of Justice with correctly declining to defend the regulation.

- d. Is this sort of issue of agency behavior at odds with the Department of Justice's representation common? Is this an isolated or unique occurrence? Please explain.**

Response: This was a unique occurrence. In my nearly 19 years of service at the Department of Justice, I cannot recall a single instance where my office made a representation to the Federal Circuit that was so at odds with the agency's subsequent behavior. I take my duty of candor and honesty to the courts very seriously, as does the department of Justice. In particular, because my office handles an especially large percentage of appeals at the Federal Circuit, it is critical that the court be able to rely on our honesty, integrity, and candor. Accordingly, we work closely with all agency counsel and personnel to ensure that all representations made to the court are fully accurate and truthful. As stated in response to the court's order, the VA made clear that it "understands and appreciates the significance of [its] commitments and deeply regrets its failure to abide by them." See Response (May 20, 2013), at 3. As the supervisory attorney in this appeal, I also deeply regret the VA's failures in this case and have worked closely with the VA to remedy any harm caused by such failure.

- e. The reason the court in this case was so alarmed by the government's conduct was that the VA continued to act contrary to its repeated assurances to the court. Although the court recently gave its preliminary approval of the government's proposed remedy, subject to a few clarifications, what changes have occurred in this specific case that will ensure to the court and to this committee that the VA will comply with the representations you, as a DOJ attorney, have made to the court through your most recent filing?**

Response: Immediately after VA's failure to comply with its representations was brought to my attention, I contacted counsel for the VA and firmly insisted that VA immediately stop applying the challenged rule. Likewise, after the court's Order to Show Cause, I and other attorneys from my office immediately began working with VA to develop a plan for identifying and fully remedying the harms caused by VA's failures. That plan was coordinated with counsel for NOVA in order to reach an acceptable proposal.

The submission to the court stated: “VA never intended to mislead the Court or NOVA, nor did it intend to prejudice any veteran’s claims. VA undertook its commitment to cease applying the 2011 Rule with sincerity and deeply regrets that it fell short of that commitment. VA also never intended to evade responsibility for remedying any harm resulting from application of the 2011 Rule. VA has collaborated with NOVA in carefully drafting this Proposed Plan in an effort to ensure that any potentially affected appellant receives an opportunity for a new decision and a new hearing, including an opportunity to submit additional evidence.” See Response (May 20, 2013), at 4-5. After reviewing this plan, the court “express[ed] satisfaction with the Government’s Response and its timeliness” and found that “the Proposed Plan appears to address in a creative and comprehensive way most of the problems for veterans” created by the VA’s failure to stop application of the challenged rule. See Order (June 10, 2013), at 2. Our supplemental response to the court’s request for clarification was filed on June 27, 2013, and, again, expressed our commitment to fully remedy any and all harms caused by VA’s conduct.

f. What efforts have you taken to ensure that this sort of issue doesn’t occur again with respect to the VA?

Response: Throughout the course of these proceedings, I have emphatically reminded VA of its duties of candor and its serious obligation to live up to its commitments to the court.

g. What steps have you taken to ensure that this issue doesn’t arise between other executive agencies and the Department of Justice during future court action?

Response: The Department of Justice takes very seriously its duty of candor and honesty toward the courts. That commitment plays a fundamental role in our effectiveness as an advocate for the United States. I, other supervisory attorneys in my office, and all trial attorneys will continue to work closely with agency counsel and other agency representatives to ensure that we continue to meet those very high standards.

4. Would you please explain the role you took in the case *Berry v. Conyers & Northover*?

a. What was your input on developing the legal strategy, writing briefs, or otherwise overseeing that effort?

Response: The briefing and argument of this case was principally handled by the Appellate Staff of the Civil Division. I was involved in developing the legal strategy and reviewing the briefs, along with a large number of other government attorneys from the Department of Justice, the Office of Personnel Management,

the Department of Defense, the Department of Homeland Security, and other agencies.

- b. You were listed on the brief with other Department of Justice officials. Would you describe your input on that document?**

Response: I reviewed drafts of the briefs and provided feedback.

- c. Would you agree that this case constitutes a substantial limit on whistleblowers' protection? Please explain.**

Response: The government's position is that this case does not constitute a substantial limit on whistleblowers' protection because this appeal involves the same type of narrow question addressed in *Egan*: whether the MSPB and the Federal Circuit can review the decision of the Executive Branch as to who is eligible to occupy a position designated as national security sensitive. Apart from the eligibility determination, employees in those positions still retain their full rights under the CSRA and the Whistleblower Protection Act. In any event, the case is pending before the en banc Federal Circuit and I would follow its decision if confirmed.

- 5. You have argued in front of the Federal Circuit many times, and your current colleagues will continue to do so once you take the bench. How will you approach the transition between the role of advocate and judge to ensure that you are fair and neutral? Also, please elaborate on what will be your approach to recusal.**

Response: As noted above, I understand and take very seriously the vast differences between being an advocate and being a judge. An advocate's role is to represent his client, advancing reasonable, good faith interpretations of the law to further the client's interest. In contrast, a judge must approach the case from a neutral, objective standpoint, determine what the law is, and faithfully apply it to the facts of the case, without regard to the identity of the litigants. If I am confirmed, I would be strongly committed to acting as a neutral and impartial judge.

I will recuse myself from all cases in which I was either personally involved as the attorney of record or as the supervisory attorney. This includes any cases pending at the Court of Federal Claims or the Court of International Trade, which may be appealed to the Federal Circuit. I also will recuse myself from any cases handled by my office prior to the date of my nomination, whether I had any personal involvement or not. Following the date of my nomination, I imposed a firewall that prevents me from having any involvement in, or knowledge of, any new cases filed at the Federal Circuit, the Court of Federal Claims, or the Court of International Trade. For those cases filed after my nomination and handled by my office, I will apply the provisions of 28 U.S.C. § 455 and the Code of Conduct for United States Judges, and any other relevant principles of judicial ethics, to determine whether to recuse in an individual matter. If confirmed, I

would also consult with other judges of the Federal Circuit regarding specific recusal issues.

6. You have written about the role of specific language in opinions, and how courts can use certain words to legitimize personal identities, especially on issues of sexual orientation.

a. Do you feel it is the responsibility of courts to help certain classes of citizens fit into society?

Response: No. The article referenced by the question was written nearly 16 years ago, very early in my legal career and when I was considering the pursuit of a career in legal academia. The article was written with that goal in mind and attempted to address the question in a way that was then-common for academic legal writing. To the extent that the article suggested that courts should “help certain classes of citizens fit into society,” I no longer adhere to those views. The role of a judge is to faithfully apply the law to the facts of the case, without regard to the identities of any of the litigants. I am firmly committed to being such a neutral, impartial judge.

b. How does the personal background of a judge factor into a judge’s decision-making and opinion-writing process? Please explain.

Response: A judge’s personal background should play no factor in the decision-making and opinion-writing process.

7. You indicated in your questionnaire that have unable to find notes, transcripts, or recordings for several of your speeches. Could you provide the committee with a more detailed description of the points covered in your lecture than is provided in your original questionnaire for the following talks?

a. May 15, 2008 Panelist, Federal Circuit Judicial Conference where the topic was “An examination of the Federal Circuit’s Deference to Board Interpretations of Civil Service Law.”

Response: This panel was chaired by the then-current Chairman of the Merit Systems Protection Board, Neil McPhie, and included other attorneys who practiced in the subject matter area. As I recall, the focus of my presentation was chiefly a description of the relevant principles of deference that federal courts owe to agency interpretations, and the way those principles are generally applied to the MSPB.

b. August 21, 2007 Speaker, Customs & Border Protection’s Chief Counsel Conference where you spoke on recent developments in federal personnel and whistleblower laws.

Response: I do not recall the specific details of my presentation. Generally, I provided an update regarding any new developments in federal personnel and whistleblower laws. I likely discussed any significant new cases from the Federal Circuit. I also answered questions from the audience.

c. March 1997 Panelist, California Western Law Review Symposium where the topic was “Towards a Radical and Plural Democracy.”

Response: I do not recall any specific details, but the substance of my presentation was reflected in the published article, “Making *Romer* Work,” which was included in my response to the Committee Questionnaire.

8. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is a firm commitment to the rule of law and the ability to apply the law to the facts of the case in a neutral, even-handed manner, without regard to the identities of the parties. I believe I possess those attributes.

9. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: A judge should be fair, impartial, and willing to fully engage the record, and the arguments of all parties in the case. Moreover, a judge should be respectful of all litigants and counsel appearing before the court. I believe I meet that standard.

10. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

11. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: In cases of first impression, the starting point is the text of the legal document involved. For instance, in a case involving statutory interpretation, a judge should first look to determine whether the language of the statute is plain and unambiguous. If so, that is the end of the inquiry and the law is then applied to the facts of the case. If the statutory language is ambiguous, a judge should consider the relevant canons of statutory construction as set forth by the Supreme Court and may also look to legislative history in determining the statute's intended purposes. If the case involved an agency's

interpretation of the statute, and the statutory language was ambiguous, I would evaluate whether the agency's interpretation was based on a permissible construction of the statute pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). To the extent that there is any analogous precedent from other courts, I would also consider that precedent.

12. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?

Response: Decisions of the Supreme Court and the Federal Circuit are binding and I would apply them regardless of my personal beliefs. In rare circumstances, the Federal Circuit can convene en banc to reconsider its own previously decided precedent to ensure uniformity of panel decisions, or to answer a question of exceptional importance.

13. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: Under the constitutional avoidance principle, a federal court should avoid deciding constitutional questions if the case can be resolved on any other basis. A federal statute is presumed to be constitutional and should not be struck down unless it is clearly inconsistent with the Constitution (for example, if it exceeds the enumerated powers of Congress).

14. In your view, is it ever proper for judges to rely on foreign law, or the views of the “world community”, in determining the meaning of the Constitution?

Response: No.

15. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?

Response: An appellate court may convene en banc to overturn its own precedent, but should do so only to resolve conflicts between panel decisions or to address questions of exceptional importance, or if intervening Supreme Court precedent compels that result.

16. Please describe with particularity the process by which these questions were answered.

Response: I received these questions on June 26, 2013, and prepared responses. On July 1, I sent my answers to an official within the Department of Justice. After receiving comments, I made revisions and then authorized the submission of my responses to the committee.

17. Do these answers reflect your true and personal views?

Response: Yes.